Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

MILAN CHONICH AND CARMEN PASCARETTI,
Petitioners.

v.

WAYNE COUNTY COMMUNITY COLLEGE and
JUANITA FORD
Respondents.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals–Sixth Circuit

♦

-and appendix-

PETITION FOR A WRIT OF CERTIORARI

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55 pp

QUESTIONS PRESENTED

I. DOES A FEDERAL JUDGE LOSE JURISDICTION TO PROCEED FURTHER WITH THE CASE AFTER A PARTY FILES TIMELY AND SUFFICIENT 28 USC 144 AFFIDAVITS?–YES

II. DOES §144 MANDATE DISQUALIFICATION FROM THE CASE RATHER THAN DISQUALIFICATION FROM HEARING A MOTION TO DISQUALIFY?–YES.

III. IS MANDAMUS APPROPRIATE RELIEF WHEN A PARTY SUFFERS "DRACONIAN RESULTS" AND IRREPARABLE HARM AT THE HANDS OF A JUDGE WHO HAS BEEN THE RECIPIENT OF EX PARTE ("EXTRAJUDICIAL") INFORMATION FROM A DISQUALIFIED, PREJUDICED AND BIASED JUDGE?–YES

LIST OF PARTIES

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1. Order of the U.S. District Court for the Eastern District of Michigan: May 27, 1993. Appendix A-2. No opinion published.

2. Order of the U.S. District Court for the Eastern District of Michigan: June 2, 1993. Appendix A-1. No opinion published.

3. Order of the U.S. District Court for the Eastern District of Michigan: June 11, 1993. Appendix A-18. No opinion published.

4. Order of the Sixth Circuit Court of Appeals: September 30, 1993. Appendix A-6. No opinion published.

5. Order of the Sixth Circuit Court of Appeals: December 28, 1993. Appendix A-14. No opinion published.

JURISDICTION

The judgment of the Sixth Circuit denying a petition for writ of mandamus to disqualify the Judge was entered on September 30, 1993. A petition for rehearing was timely filed and denied on December 28, 1993. The jurisdiction of this court is invoked under 28 USC 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES & RULES

United States Code of Judicial Conduct Canon 3(4), reads in pertinent part: "A judge should...neither initiate nor consider ex parte or other communications on the merits or procedures affecting the merits of a pending or impending proceeding."

28 USC § 144:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further of any adverse party, such judge shall proceed no further therein, but another judge shall ne assigned to hear such proceeding.

STATEMENT OF THE CASE

This case has already gone through two full trials, and two appeals to the Court of Appeals for the Sixth Circuit. The case was initially filed in Wayne County Circuit Court in 1984. In 1985, a federal claim arose and the state case was merged with the federal claim. In 1987, a jury awarded 1.2 million to the Petitioners in CHONICH I. The Sixth Circuit remanded the case for a new trial on issues that were summarily dismissed and for a new trial on damages due to instruction errors. The second trial, CHONICH II, ended with another finding of liability, but the Judge presented a verdict form that effectively blocked the award of damages. The Sixth Circuit reversed and the case is now set for a third trial. District Judge Horace Gilmore presided at the first two trials. It was during the second trial that Petitioners began to have problems with the presiding Judge. The following facts which were attested to in Petitioners' §144 affidavits and were certified as truthful by counsel, will provide a basic understanding of the extrajudicial source that required the disqualification of the current district

Judge and, perhaps the Eastern District.

I. HISTORY OF THE EXTRAJUDICIAL OUTSIDE SOURCE.

In November, 1986, a Michigan Court of Appeals Judge, S. Jerome Bronson, committed suicide after being charged with corruption and the fixing of appellate cases. This resulted in a massive federal and state investigation involving prominent personal injury attorneys and judges in the Detroit area. In 1989, Petitioners' counsel became a key eye witness in the corruption scandal for the Department of Justice, State Bar of Michigan, Michigan Judicial Tenure Commission and Michigan Attorney Grievance Commission. Petitioners had heard comments and received indications that Judge Gilmore was closely tied and connected to the lawyers under investigation.

A short time later, Judge Cook, Chief Judge of the Eastern District, announced a concern over problems with the Eastern District's U.S. Attorney's Office. After consulting with friends and colleagues, Petitioners' counsel decided to contact Judge Cook and relay the Gilmore information to the Chief Judge. Judge Cook contacted the Department of Justice,

Office of Professional Responsibility in Washington, D.C., who flew in representatives to interview Petitioners' counsel. The Office of Professional Responsibility reopened the federal investigation, and included the names of more individuals. Judge Gilmore disqualified himself due to his prejudice and bias in this matter.

On July 23, 1992, Petitioners' counsel met Judge Edmunds, (hereinafter Respondent or District Court), for the first time. The Respondent started the in chamber status conference with a very hostile tone directed at Petitioners' counsel and stated: "I've been fully briefed on this matter by Judge Gilmore...Judge Gilmore and I have had lengthy discussions concerning this case...How did I get so lucky?"

A consensus of legal ethics experts has it that a Judge may not communicate with anyone about a pending matter, (with the exception of ministerial duties), without permission of all counsel. See Code of Conduct for United States Judges Canon 3 (4). " A Judge should...neither initiate nor consider ex parte or other communications concerning a pending or im-

pending proceeding." This ex parte communication gave the Respondent "personal knowledge" from an "extrajudicial source", and, unfortunately for Petitioners, the source of the information was tainted to such a degree that it required a 28 USC 455 disqualification of a federal judge. On May 25, 1993, Petitioners filed §144 affidavits for the District Court's disqualification. The District Court denied the disqualification request on May 27, 1993. On June 2, 1993, the District Court found that the affidavits complied with §144, and, due to the compliance, partially vacated the May 27, 1993 order because it realized that compliance with §144 prohibited it from proceeding. The court has refused to follow the direct mandate of the statute and continues to proceed with the case despite its June 2, 1993 ruling.

REASONS FOR GRANTING THE PETITION

The refusal of the District Court to disqualify itself after it ruled Petitioners had complied with 28 USC §144, leaves a judge without jurisdiction presiding over this 10 year old case.

The Sixth Circuit's refusal to enforce the mandate of the statute, (because it misinterpreted unambiguous case law regarding the ability to grant mandamus relief), denies litigants due process, subjects the federal bench to scrutiny, erroneously interprets federal law and case law, all of which can only be resolved and corrected by an immediate determination and enforcement of the true mandate of 28 USC §144.

I. A FEDERAL JUDGE LOSES JURISDICTION TO PROCEED FURTHER WITH THE CASE AFTER A PARTY FILES TIMELY AND SUFFICIENT 28 USC 144 AFFIDAVITS.

and

II. 28 USC §144 MANDATES DISQUALIFICATION FROM THE CASE RATHER THAN DISQUALIFICATION FROM HEARING A MOTION TO DISQUALIFY.

Sixth Circuit Judge Wellford, in his analysis and summary of the conduct of the district court, suggests that the grounds for Petitioners' motion for disqualification of the district court come from a "strained reading" of the §144 statute. With all due respect, to Judge Wellford, the reporters abound with cases establishing precisely the point made by Petitioners. The trial

court has no discretion. Affidavits found sufficient and timely by the judge will suffice, with nothing more, to bring about a recusal of that judge, "forthwith." U.S. V. Fujimoto, 101 F Supp 293 (DC. Hawaii 1951); McCann v. Communications Design Corp., 775 F Supp 1506 D. Conn. 1991; Berger v. United States, 255 US 22 (1920; Marty's Floor Covering v. Gaf Corp., 604 F2d 266 (1979); Mitchell v. United States, 126 F2d 550 (1942); United States v. Townsend, 478 F2d 1072 (1973); Parker v. Sills, No. 92-1158, 1993 US App. Lexis 6922 (6th Cir. March 25, 1993). [There are numerous cases supporting Petitioners' reading in the annotations following the statute in 28 USC §144]. Section 28 USC §144 reads as follows:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further of any adverse party, such judge shall proceed no further therein, but another judge shall ne assigned to hear such proceeding.

Petitioners read this statute as stating that the making and filing of timely and sufficient affidavits automatically dis-

qualifies a judge. The above cited cases support this reading. If the petitioners are correct, and the above case law is correct, **then the District Court automatically disqualified itself from the case, not just the motion to disqualify, when it entered its June 2, 1993 order.** If the Sixth Circuit is correct, that §144 does not require automatic disqualification upon the filing of timely and sufficient affidavits, then this Court must clearly explain the correct interpretation and correct application of the statute, because there is considerable case law to the contrary. If petitioners are correct, then a disqualified judge, who is completely without jurisdiction, will be ruling on the petitioners' case. This will cause irreparable harm to petitioners and their counsel.

On May 27, 1993, the District Court issued a 12 page opinion denying Plaintiffs' motion for reconsideration of counsel's disqualification and denying Plaintiffs' motion to disqualify the judge. The District Court addressed the merits of and issues presented in the §144 affidavits in the May 27, 1993 order. On June 2, 1993, prior to any further action by either

party, the court sua sponte issued a new order. From the language of the June 2, 1993 order, it is clear that the court did one thing: it determined that Plaintiffs had filed affidavits which were legally sufficient and timely, and determined that it could proceed no further as per §144. It is clear that the District Court, after ruling on the merits and sufficiency of the §144 affidavits, reviewed the statute, and realizing that timely and sufficient affidavits prevented her from proceeding, she entered her June 2, 1993 order. What the District Court didn't understand in making such a finding was that it automatically disqualified her from the case. The District Court either intentionally or erroneously believes that a timely and sufficient affidavit filed pursuant to 28 USC §144, prevents the target judge from proceeding further with the motion, and that the merits of the motion must be heard by another judge. Obviously, the court is incorrect. The cases cited above clearly, and without any ambiguity, mandate that a timely and sufficient affidavit automatically disqualifies the target judge from the case.

Once the affidavits are filed, the target judge may only determine that they are timely and legally sufficient. It can proceed no further. As the Berger court noted:

> It's [the statutes'] explicit declaration is that, upon the **making and filing** of the affidavit, the judge against whom it is directed 'shall proceed no further therein, but another judge shall be designated in the manner prescribed ...to hear such matter.' To commit to the judge a decision upon the truth of the facts gives chance for the evil against which the section is directed. The remedy by appeal is inadequate. It comes after the trial and, if prejudice exists it has worked its evil and a judgment of it in a reviewing tribunal is precarious...We come then to the questions certified, and as to the first we answer, Yes, that is, **that the affidavit of prejudice is sufficient to invoke the act...** Berger, supra at 36. (Emp. Supp.)

In Marty's, supra at 268, the court cited Cole v. Loew's Inc., 76 F. Supp 872, 877 (1948), and stated as follows:

> the truth of the affidavit cannot be adjudicated by the judge involved **or anyone else.** If the target judge finds them legally sufficient, the **disqualification is automatically effected.** (Emp. Supp.)

Petitioners' June 7, 1993 Motion for Reconsideration cited the above referenced cases which mandate automatic disqualification upon the filing of timely and legally sufficient

affidavits. The only issues addressed in the June 7, 1993 Motion were the court's ability to proceed with any aspect of this case after a §144 affidavit had been filed, and the court's refusal to acknowledge its own disqualification as per its June 2, 1993 order. The court, obviously shaken by its misreading and misinterpretation of the statute, failed to address its ability to proceed with the case, and cited Parker, supra as its authority for reassigning the motion to disqualify. Unfortunately, the court has not only misread and misinterpreted the statute once again, but it clearly misreads and misstates the language of Parker, supra. Parker completely supports the **Petitioners'** position and in no remote way does it give the District Court authority to permit another judge to hear the merits of the affidavits, nor does it promote any rule whatsoever that "reassignment is permissive." See June 11, 1993 order. Appendix A-18. The Parker court not only states that the target Judge cannot reassign a §144 affidavit for a hearing, but that a timely and sufficient affidavit mandates disqualification from the case. Nor does it permit the court to proceed with the case after a §144

affidavit is filed. Respondent can cite no authority (accurately) that proceeding with the case is "permissive." Respondent cannot "repeal" her June 2, 1993 order which acknowledged the filing of timely and legally sufficient affidavits, which "accordingly" warranted the court to proceed no further. She cannot under any circumstance justify proceeding with Plaintiffs' Motion for Reconsideration as to Plaintiffs' counsel's disqualification. Respondent's blatant refusal to address this issue presented to her in Plaintiffs' May 21, 1993 motion and in Plaintiffs' June 7, 1993, motion, indicates a direct refusal to acknowledge plain, unambiguous statutory law. The result of this wilful ignoring of the law, if left uncorrected until the appellate stage, will result in Petitioners' being forced to proceed without counsel and, inevitably, a loss of Petitioners' case, and Petitioners' counsel's loss of reputation. Distressingly, these rulings have a real and substantial benefit only for those currently or prospectively under investigation for corruption in the judicial system.

It is clear that no transfer to another judge is called for, or permitted. It is the duty of the trial judge to review and pass

on the sufficiency and timeliness of the affidavits. If they are legally sufficient and timely, nothing further is to be done by that judge - recusal is mandated by the statute. This is not a strained reading of the statute; this is the plain meaning of the statute, as interpreted by literally dozens of cases across the circuits. The existence of improprieties here, notwithstanding the appearance of improprieties, is profound. The ex parte communication between Respondent and Judge Gilmore is the catalyst (core) that brought about the "Draconian" results and horrors that are plaguing this case and that Petitioners fear will continue to plague the case.

1. THE RESPONDENT'S EX PARTE COMMUNICATION WITH A DISQUALIFIED JUDGE VIOLATES CANON 3(4) OF THE CODE OF CONDUCT FOR UNITED STATES JUDGES.

Despite the consensus that an ex parte communication with a prejudiced and biased disqualified Judge is unethical, Petitioners were advised to move slowly and cautiously in trying to disqualify the second Judge. Petitioners, having already successfully disqualified one federal Judge, did not want to appear rash in accusing a second federal Judge of unethical conduct.

Certainly, the ex parte communication with a prejudiced and biased disqualified Judge gives Petitioners a right to question the impartiality of Respondent, which is the only standard for disqualification required by 28 USC §455(b) and §144, and should have raised concern in the Sixth Circuit. Amazingly, the Sixth Circuit never addressed this troubling issue.

The Code of Conduct for United States Judges clearly permits judges to discuss certain limited matters of a case with other Judges and their court staff as long as it pertains to ministerial and adjudicative duties, not including the merits of or the procedures affecting the merits of a pending proceeding. Canon 3 (4) states: "A judge should...neither initiate nor consider ex parte or other communications on the merits or procedures affecting the merits of a pending or impending proceeding." When Petitioners cited this Canon from the Federal Code, the District Court indignantly cited the Michigan Code of Judicial Conduct to exonerate it from the misconduct allegations.

Apparently, in its hast to deny orders against the Peti-

tioners, the District Court "forgot" it was a federal judge, bound by the federal code. The District Court claims in the May 27, 1993 order that Plaintiffs' accuse Judge Gilmore of bias and prejudice and of having an ex parte communication with Respondent. This is not true. Judge Gilmore disqualified himself due to prejudice and bias and, Petitioners' directly accuse the Respondent of having an ex parte communication with a prejudiced and biased disqualified judge. Even if it were appropriate for one judge to communicate with another about the merits of a pending proceeding, we have here the added impropriety of discussing the merits of this case with a known prejudiced and biased individual, who, pursuant to §455, disqualified himself.

The District Court did admit to the ex parte conversation with her predecessor, but completely minimized the nature and extent of the ex parte communication in her May 27, 1993 order as "brief." There is no time limit in the Canons that speak to the length of an ex parte communication. One word may be totally sufficient. Most troubling is that the District Court, after being directly confronted with these allegations, has

never come forward and disclosed the content of the discussion, which is required under Canon 3 of the Code of Conduct for United States Judges.

Aside from the above, the taint and prejudice against the Petitioners, which resulted from the ex parte conversation with a disqualified Judge, was made clear in the Petitioners' first Court appearance. The first ruling made by the District Court was to summarily decide disputed issues of fact, without an evidentiary hearing, and find that Petitioners' counsel had violated the Michigan Rules of Professional Conduct for accepting an elected position as Trustee at Wayne County Community College.

After the November, 1992 election, and realizing the potential appearance for a conflict of interest, Petitioners' counsel reviewed Michigan's Rules of Professional Conduct and contacted the State Bar of Michigan's Character and Fitness Chief Investigator Dennis Path, and Attorney Grievance Commission for ethical clearance. In addition, she contacted a local law school dean, two law professors and various attorney friends

for opinions. The State Bar Character and Fitness Chief submitted an affidavit to the Court stating that counsel's conduct did not constitute a conflict of interest and did not violate the Michigan Rules of Professional Conduct. The Attorney Grievance Commission, which has the exclusive jurisdiction for interpreting and enforcing the MRPC, stated that counsel was in full compliance with the ethics code. This information was given to Respondent, who chose to completely ignore it.

Irreparable harm is apparent. These petitioners suffered termination of employment and triple demotions. They are economically destroyed by the costs of this litigation. Petitioners cannot afford another trial and another appeal, especially under these circumstances, when they are looking at a certain appeal and a certain fourth trial. To ignore the financial devastation, is, as Judge Wellford stated, "a quasi-dismissal of the case."

It should be noted that at no time has there been any discussion of the allegations made by Petitioners with respect to the court's conduct in discussing this case with a judge who had

recused himself under § 455. Neither the district court, the "reviewing" district court, nor the Sixth Circuit has ever addressed the fact that the district court concedes that it had a conversation concerning this case with the judge who was disqualified for prejudice and bias against the Petitioners.

Petitioners strongly believe that the ex parte communications with a disqualified judge resulted in the "Draconian results", as described by Judge Wellford of the Sixth Circuit, that effectively deny them due process. Petitioners further believe that Draconian justice will continue until this Court says we've seen enough. Ex parte communications are unethical and are grounds for disqualification, because it gives the presiding Judge "personal knowledge" (and in this case tainted personal knowledge) of the merits. An unethical act is clearly an impropriety, and the standard for disqualifying a Judge is the appearance of impropriety. Why are Petitioners facing the apparent impossible task of getting a Court to review these accusations prior to facing the enormous expense of a third trial. This is especially alarming when one considers the language of Berger.

The individuals named in the corruption scandal are direct beneficiaries of the District Court's ruling. With Petitioners' counsel's integrity tarnished, her credibility against these prominent individuals is severely diminished. The Michigan Supreme Court has been confronted with sealed documents from the targets of corruption, demanding that Petitioners' counsel's testimony against them be stricken, and that she be banned from further testimony due to her "unethical" conduct in the present case.

By summarily finding that Plaintiffs' counsel violated the Michigan Rules of Professional Conduct, the court instantly destroyed counsel's reputation in the community. Forgetting (or never having heard of) the concept of a due process hearing, The District Court wittingly or unwittingly became a conduit for corruption. If this is not a direct impropriety, nothing could be a better example of an "appearance of impropriety." Even if the District Court innocently and unintentionally aided the targets of corruption by its actions, the appearance of impropriety is so profound that this case must be removed from

that court now, prior to the appellate stage, and perhaps moved from the entire Eastern District.

The posture of this case now, given the denial of mandamus by the Sixth Circuit, is that this same judge, after Judge Wellford's judicial spanking, has now agreed to listen to the evidence it has already rejected four times as insufficient to remove counsel's "unresolvable conflict." And, this is all to be done by a disqualified Judge, without jurisdiction! Petitioners in this case, thinking they were in the United States District Court, have found themselves on the other side of the looking-glass, with jurisprudence courtesy of the Queen of Hearts - sentence first, verdict afterwards. Perhaps, unlike the Knave of Hearts, Petitioners should be grateful that their heads are not the subject of that sentence, but rather only the effective loss of a ten year old case, involving two trials, IN BOTH OF WHICH THEY PREVAILED!!

III. MANDAMUS IS APPROPRIATE RELIEF WHEN A PARTY SUFFERS "DRACONIAN RESULTS" AND IRREPARABLE HARM AT THE HANDS OF A JUDGE WHO HAS BEEN THE RECIPIENT OF EX PARTE ("EXTRA-JUDICIAL") INFORMATION FROM A DISQUALIFIED, PREJUDICED AND BIASED JUDGE.

1. MANDAMUS WAS AND IS AN AVAILABLE REMEDY FOR PETITIONERS IN THE SIXTH CIRCUIT

In its denial of mandamus, the Sixth Circuit relied on the leading case of Richardson-Merrill, Inc. v. Koller, 472 U.S. 424 (1985). Unfortunately, in reciting the requirements for issuance of a mandamus, the Sixth Circuit erroneously concluded that Petitioners did not meet those requirements, the panel ignored significant language from that opinion, which clearly provides for Petitioners' requested relief:

> Moreover, a rule precluding appeal pursuant to § 1291 would not necessarily leave the client or the disqualified attorney without a remedy. As we noted in Firestone, 'a party may seek to have the question certified for interlocutory appellate review pursuant to 28 U.S.C. § 1292(b), . . . and, in the exceptional circumstances for which it was designed, a writ of mandamus from the court of appeals might be available. p. 435

Thus, contrary to the panel's assertion that Koller prohibited mandamus relief, the Koller court contemplated mandamus as a remedy in attorney disqualification cases, (which must certainly include judicial disqualification), albeit in exceptional circumstances. Petitioners find themselves in an extraordinary situation, ably summarized by Sixth Circuit Senior Judge

Wellford. How much more exceptional a case need be in order to qualify for exceptional relief is difficult to imagine. Petitioners have sought to have the district court transfer the case in its entirety to another judge to which, by any notion of due process, they are entitled. They were refused three times by the district court. Only at the urging of Judge Wellford did the court change its mind to even provide counsel a hearing on her disqualification.

The Koller court makes several observations which help to illuminate the exceptional nature of this case, and hence the justification for the issuance of a writ of mandamus. "Most pretrial orders of district judges are ultimately affirmed by appellate courts." Koller, supra at 434. "Finally, we share . . . concern about 'tactical use of disqualification motions' to harass opposing counsel. ...Implicit in § 1291 is Congress' judgment that the district judge has primary responsibility to police the prejudgment tactics of litigants..." Under the circumstances of this case, these statements by the Supreme Court encapsulate the fears of Petitioners, and highlight the exceptional nature of

this case.

At the urging of Judge Wellford, the district court has "determined that it desires" a reconsideration of counsel's disqualification. But what is there to prevent a charade? This judge has effectively ruled four times that counsel's conflict is unresolvable, in the face of proffered evidence identical to that which will be presented at an evidentiary hearing. Awareness of the presence of such evidence was not sufficient to have the court change its mind even to the extent of affording a full hearing." Only Judge Wellford's "urging" could do that. Can these Petitioners really rely on "Congress' judgment that the district judge has primary responsibility to police the prejudgment tactics of litigants . . ." Koller, supra, when it is the district judge's judgment, jurisdiction and impartiality that has been called into question?

But Defendants will argue, and the Sixth Circuit has written, this is a matter to be argued later, on appeal. Again, Koller: "Most pretrial orders of district judges are ultimately affirmed by appellate courts." And on appeal the standard by

which the ruling of the district court in the evidentiary hearing will be judged is "clearly erroneous." In re Mechem, 872 F2d 872, 874 (6th Cir. 1989). In other words, we have a court arguably predisposed against Petitioners, and arguably without jurisdiction, continuing to preside over this case. That court saw nothing wrong in what can only be described, as summarized by Judge Wellford, as a parade of horribles. That court can now conduct a hearing, in order to "correct" the horribles, find unpersuasive evidence which the same court had previously found unpersuasive FOUR TIMES, and be judged on appeal by a standard substantially deferential to the findings of that court. And this, we are told, is due process under the fifth amendment of the Constitution of the United States at the end of the twentieth century.

Petitioners are faced with a problem as old as the Roman republic: QUI CUSTODIET IPSOS CUSTODES? [Who guards the guards?] If rules of procedure are not sufficiently flexible to embrace the above recited set of facts as "extraordinary," what remains of protection against biased, or intemperate

judges? This is no trivial case. It has consumed enormous amounts of time, energy, money, judicial resources, and is still not resolved. Petitioners have prevailed at two trials, and now face the effective dismissal of their case if the district court is to have its way. QUI CUSTODIET IPSOS CUSTODES?

For mandamus to lie, petitioners must establish that they "have a clear and certain right and that the duties of the District Court are ministerial, plainly defined and peremptory." In re City of Detroit, 828 F2d 1160 (6th Cir. 1987), at 1166.

Here, the duties of the Court are ministerial. The District Court has ruled in its June 2, 1993 order that it can proceed no further with this matter, because timely and sufficient affidavits were filed. "Accordingly", it partially vacated its May 27, 1993 order, but erroneously (by ministerial error), transferred only the motion for blind draw, not the entire case. The District Court was simply wrong on its interpretation of the mandate of the statute. The clerk conducted a blind draw, and the motion was assigned to Judge Zatkoff. Judge Zatkoff had nothing to hear. When a timely and sufficient affidavit is filed,

"the truth of all the allegations of fact contained therein is admitted." Mitchell v. United States, 126 F2d 550, at 552 (1942). In Marty's, supra, the court stated that the target judge must accept facts alleged in the affidavit as true, just as a common law demurrer. It does not determine the truth of the allegations. "The truth of the affidavit cannot be adjudicated by the judge involved or anyone else." Marty's at 268. What then had Respondent ministerially given to Judge Zatkoff to hear? He clearly could not hear the truth of the affidavits. He clearly could not hear the merits of the affidavits. Petitioners wonder if the Eastern District suddenly decided that the law does not apply in this case. The District Court ministerially erred by asking for a blind draw of the motion only. The June 2, 1993 order mandates that the District Court is automatically disqualified. Appendix: A-1. This is a ministerial task. The District Court has already properly determined and acknowledged that Petitioners' complied with 28 USC §144, and that "accordingly", she could proceed no further. Ministerially, however, the Court did proceed further. It was without jurisdiction to deny Petitio-

ners' Motion for Reconsideration of Petitioners' counsel's disqualification. **It was without jurisdiction to proceed at all once the timely and sufficient affidavits were filed and acknowledged by the June 2, 1993 order.** The Supreme Court in Berger was clear--the making and filing of the affidavit invokes the act. Berger, supra, at 36 The affidavits were made and filed on May 25, 1993. The District Court was without jurisdiction to proceed with the lone exception to pass upon the legal sufficiency of the affidavit. Berger, supra. Parker, supra. Marty's, supra. A legally sufficient affidavit is one that sets forth facts including time, place, persons and circumstances and does not provide mere conclusions. United States v. Townsend, 478 F2d 1072 (1973).

A motion to disqualify the court should not be made lightly, and it most certainly was not in this case. Such a motion should likewise not be treated to judicial legerdemain and cavalierly dismissed, particularly once statutory requirements are found to be present.

SUMMARY

The plain, unambiguous language of 28 USC §144 mandates that the District Court is disqualified by its June 2, 1993 order. After rethinking its May 27, 1993 order, and finding compliance with the statute, which "accordingly" warranted it to partially vacate part of a 12 page opinion, the Court was automatically disqualified from the case, not the motion. Permitting a court to undo a finding of compliance with the statute, because it didn't mean to automatically disqualify itself, is no defense to the finding of statutory compliance. If the affidavits were not timely and were not sufficient, why did the District Court undo its May 27, 1993 order? There was no reason for the District Court to disturb the May 27 order unless Petitioners had filed affidavits that complied with the statute. The June 2 order, in plain English, disturbs the May 27 order and sets forth the compliance with §144. The District Court is automatically disqualified and cannot be permitted to continue on this case.

CONCLUSION

The petition for Writ of Certiorari should be granted and the proceedings in the District Court stayed until the status of the District Judge is resolved. Given the clarity of the Sixth Circuit's misapplication of Koller and 28 USC §144, Petitioners believe that summary reversal is warranted.

Respectfully Submitted,

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APPENDIX TO PETITION FOR CERTIORARI

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ORDER PARTIALLY VACATING MAY 27 ORDER

(Chonich et al, Plaintiffs, v. WCCC et al, Defendants, 85-71172-DT, entered on June 2, 1993 by the Hon. Nancy G. Edmunds, U.S. District Judge)

On May 27, 1993, this Court entered an order denying Plaintiffs' motion for reconsideration and denying Plaintiffs' motion to disqualify the judge under 28 USCA §§144 and 455.

Section 144 provides:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further of any adverse party, such judge shall proceed no further therein, but another judge shall ne assigned to hear such proceeding.

Accordingly, the Court hereby VACATES that portion of the May 27, 1993 order denying Plaintiffs' motion to disqualify the judge, and the motion to disqualify shall be assigned to another judge.

/s/ NANCY G. EDMUNDS
U.S. District Judge
Eastern District of Michigan

(Certification Omitted)

ORDER DENYING PLAINTIFFS' MOTION FOR RECONSIDERATION AND DENYING PLAINTIFFS' MOTION TO DISQUALIFY THE JUDGE

(Chonich et al, Plaintiffs, v. WCCC et al, Defendants, 85-71172-DT, by the Hon. Nancy G. Edmunds: Relevant excerpt (pages-10, 11, 12) of the May 27, 1993 order regarding the 28 USC §144 and 455 motion and affidavits)

III. Motion to Disqualify the Judge

Plaintiffs have also moved to disqualify this Court from hearing this case under 28 U.S.C.A. §§144 & 455. Sections 144 and 455 provide for disqualification of a judge due to bias or prejudice. These statutes must be strictly construed to safeguard the judiciary from frivolous attacks. Rademacher v. City of Phoenix, 442 F.Supp. 27 (D. Ariz. 1977). Further, a claim of bias or prejudice must be based on something other than rulings in the case. Hanger v. U.S., 398 F.2d 91(8th Cir. 1968), cert. denied 393 U.S. 1119 (1969).

While the bases for Plaintiffs' motion to disqualify is difficult to discern from their various allegations, (footnote: Plaintiffs motion mentions facts regarding wholly unrelated

matters, such as the investigation of Judge Bronson, a Michigan stat court judge), it appears that the bases of their motion are the following: (1) they allege that the Court is biased and prejudiced as reflected by the "one cent" statement discussed above; (2) they allege that Judge Gilmore, the judge involved in the first two trials of this case, was biased and prejudiced and that he had improper ex parte communications with this Court; and (3) they allege that the Court has prejudged their case.

As discussed above, the allegation that the Court considers settlement of cases to be unethical and a breach of fiduciary duty, and that the Court was prejudiced with a belief that Plaintiffs' case was not worth anything is false. The Court made no comment whatsoever regarding the issue of settlement or the value of Plaintiffs' case.

With regard to the issue of this Court's communications with Judge Gilmore regarding this case, Plaintiffs allege that any communication was a violation of Canon 3(4) of the Code of Judicial Conduct. Canon 3(4) provides:

> A judge should accord to every person who is legally interested in a proceeding, or his lawyer,

> full right to be heard according to law, and, except as authorized by law, neither initiate, consider, nor permit ex parte or other communications with a litigant or his attorney concerning a pending or impending proceeding.

This Canon prohibits ex parte communications with a litigant or his attorney. Plaintiffs do not allege that the Court has engaged in any such communications. Moreover, communications between Judge Gilmore and this Court have been limited to a brief discussion of the nature of this case at the time it was transferred to this Court's docket; such a communication does not violate ethics nor does it render this Court biased or prejudiced in this case.

Plaintiffs also claim that this Court has prejudiced their case, based on a statement the Court made at the May 5 hearing, The Court stated:

THE COURT: Well, it seems to me that if I disqualify you, that, no, you can't vote on that, and that someone else would have to represent your--represent you in your claim for attorney fees, and that someone else would have to take over for Mr. Chonich, what I expect to be a fairly short retrial of a limited issue in this matter.

The Court's statement merely reflected the view that the trial of this matter is not expected to be protracted. The statement does not indicated any predisposition regarding the merits of this case.

Accordingly, no ethical violation has occurred, and no bias or prejudice exists. It appears that Plaintiffs' claim of bias and prejudice is based on this court's ruling on the College's motion to disqualify Ms. Radulovich. A motion to disqualify a judge must be based on something other than rulings in this case. Hanger, 398 F.2d 91. As a result, Plaintiffs' motion to disqualify is denied.

/s/ NANCY G. EDMUNDS

U.S. DISTRICT JUDGE

(certification Omitted)

ORDER DENYING PETITION FOR WRIT OF MANDAMUS

(Chonich et al, Plaintiffs/Petitioners, v. WCCC et al, Defendants, LC: 85-71172DT, COA: 93-1895 (entered September 30, 1993 by the United States Court of Appeals for the Sixth Circuit)

BEFORE: MARTIN and JONES, Circuit Judges; and WELLFORD, Senior Circuit Judge.

The plaintiffs seek a writ of mandamus directing the district court to take no further action in this case and to transfer the case in its entirety, including a motion to reconsider the disqualification of plaintiffs' counsel, to another judge. The district court has filed a response to which plaintiffs have replied, and this matter is ripe for consideration.

It is initially noted that the disqualification of plaintiffs' counsel cannot be raised to this court either on appeal at this time or via a petition for writ of mandamus. Richardson-Merr-

ell, Inc. v. Koller, 472 US 424 (1985); In re: Mechem, 880 F.2d 872 (6th Cir.1989). The plaintiffs seek, however, to vacate the district court's order denying their motion to reconsider disqualification of their counsel and to transfer that motion to another judge. Therefore, we have reviewed the petition despite its filing by an attorney disqualified from the action.

The refusal of a district judge to disqualify himself may be reviewable in mandamus in certain circumstances. In re Aetna Casualty, 919 F.2d 1136 (6th Cir. 1990) (en banc). In the instant case, the plaintiffs sought the disqualification of the district judge pursuant to 28 USC §§144 and 455. Although the judge initially denied the motion, she later vacated that order and referred it to another judge for consideration. Plaintiffs argue that at that point, the district judge was obligated to transfer the entire case to another judge because she had implicitly found the affidavits in support of disqualification timely and sufficient. Upon review, we do not believe that the district judge made the finding urged by plaintiffs or that she

abused her discretion in transferring the motion to another judge for consideration. The remedy of mandamus is a drastic one, to be invoked only in extraordinary situations where the petitioner can show a clear and indisputable right to the relief sought. In re: American President Line, 929 F2d 226, 227 (6th Cir. 1991) (order). Such a right to relief is not shown in this case.

It therefore is ORDERED that Plaintiffs' petition for a writ of mandamus is denied.

ENTERED BY ORDER OF THE COURT

/s/ LEONARD GREEN

Clerk

HARRY W. WELLFORD, Senior Circuit Judge, concurring:

While I join in the decision of the pane, I wish to express my concern about the Draconian results produced. This case has been before our court three times and has been pro-

ceeding for over eight years. This case originally arose when plaintiffs sued Wayne County Community College and one of its trustees for reverse discrimination and defamation. The plaintiffs were initially successful at trial and were awarded a substantial recovery. We reversed, however, some portions of the trial court's judgment and remanded for further proceedings. Chonich v. Wayne County Community College, 874 F2d 359 (6th Cir. (1989). We heard the case again following the first remand order and remanded the case yet another time. Chonich v. Wayne County Community College, 973 F2d 1271 (6th Cir. 1992). Following this second remand, counsel for plaintiffs, Ms. Radulovich, was disqualified when she accepted a position on the Board of Trustees for the defendant College. It is this disqualification that she seeks to avoid pursuant to her petition for a writ of mandamus.

The law is clear that "orders disqualifying counsel in civil cases, like orders disqualifying counsel in criminal cases and orders denying a motion to disqualify in civil cases, are not

collateral orders subject to appeals as 'final judgments' within the meaning of 28 USC §1291." Richardson-Merrell, Inc. v. Koller, 472 US 424 (1985). Therefore, the plaintiffs had the option to wait to appeal the disqualification until a final judgment had been rendered after another lengthy and expensive trial with new counsel or to seek immediately a writ of mandamus. The plaintiffs have sought the latter alternative, understandably.

The plaintiffs base their petition for a writ of mandamus on the following two assertions: (1) that Judge Edmunds was without jurisdiction to rule on the motion to disqualify the plaintiffs' counsel; and (2) that Judge Edmunds should be directed to disqualify herself from the case because of alleged bias. This court has the power to grant a writ of mandamus under the All Writs Statute (28 USC §1651). The party seeking the writ, however, has the burden of showing: (1) there is no other adequate means by which to attain the relief desired; and (2) there is a clear and indisputable right to the issuance of the

writ. Allied Chemical v. Daiflon, 449 US 33, 35 (1980). The Supreme Court created these two requirements because the remedy of mandamus is rare and should ne invoked only in extraordinary situations. Will v. United States, 389 US 90 (1965). Only in exceptional circumstances, amounting to a judicial usurpation of power, will normally justify the invocation of this extraordinary remedy. Id. The Supreme Court adopted this strict policy limiting the granting of a writ of mandamus to avoid unnecessarily making the district court judge a litigant and to avoid the administrative difficulties of "piecemeal appellate litigation." Allied Chemical, 449 US at 35. In light of the strict requirements and the policies underlying them in a mandamus action, the plaintiffs' arguments as stated must fail, but I believe the case is a close one. The plaintiffs' only arguments are based upon a strained reading of the federal statutes governing the recusal of district judges, 28 USC §144.

Despite this ruling, I remain troubled by the way in which the hearing to disqualify the plaintiffs' counsel, Ms.

Radulovich, was originally handled. Judge Edmunds summarily decided the issue without allowing the offer of any evidence whatsoever. This refusal to allow any evidence is particularly disturbing in this case because of the great lengths to which Ms. Radulovich apparently went to assure that accepting the position as trustee would not adversely affect her ability to represent her clients. Ms. Radulovich purportedly contacted the Michigan Bar Association, a local law school dean, two law professors, and various colleagues concerning the propriety of her actions. All of these persons allegedly agreed that her actions neither violated the Michigan rules of professional conduct no represented a conflict of interest. While not endorsing the correctness of these interpretations, the district court should have considered this and afforded a full hearing on the conflict question. This case has involved tremendous expense, time, and effort, and the district court should have been aware of the extremely adverse effect upon the plaintiffs by taking this summary action. The plaintiffs originally prevailed

and were awarded a large recovery. The merits of this case still hang in the balance. Summarily dismissing the plaintiffs' counsel from the case without as much as an evidentiary hearing works substantial hardship upon the plaintiffs because of the procedural and substantive complexities that have developed in this case. Dismissing the plaintiff's counsel at this late date may act as almost a quasi-dismissal of the action. Regardless of the competency of the new counsel the plaintiffs may obtain, it will require a Herculean effort on the new attorney's part to grasp the issues and the unusual history of the case, not to mention the extra time and expense involved.

Had plaintiffs phrased their petition for a writ of mandamus so as to attack the substance of the district court's ruling instead of the jurisdiction of that court, a different result might have been reached. On the present record, I reluctantly agree that the petition must be denied, but I harbor the hope that the district court may yet reconsider the disqualification issue under all the circumstances.

ORDER DENYING PETITION FOR REHEARING OR EN BANC HEARING

(Chonich et al, Plaintiffs/Petitioners, v. WCCC et al, Defendants, LC: 85-71172DT, COA: 93-1895 (entered December 28, 1993 by the United States Court of Appeals for the Sixth Circuit) BEFORE: MARTIN and JONES, Circuit Judges; and WELLFORD, Senior Circuit Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

Following this court's September 30, 1993 denial of the petitioners' petition for mandamus, the petitioner have submitted a motion for rehearing (and/or en banc hearing) raising a number of contentions. The petition has been submitted by counsel whose status has been questioned because of a question of potential conflict of interest. The petitioners concede that "disqualification rulings are not appealable until the completion of the case," but refer to "recent events [that] warrant a rehear-

ing." We have reviewed the submissions carefully and conclude that the extraordinary relief sought is not warranted.

We note that following our previous order of September 30, 1993, which denied mandamus relief, the district judge entered an order, dated October 8, 1993, indicating a willingness to reconsider the disqualification of Sue E. Radulovich as counsel for the petitioners and that, pending an evidentiary hearing, "Radulovich is still counsel of record and amy appear in their behalf until the court orders otherwise." The petitioners then sought the mandamus reconsideration now before us setting forth in strong and strident tones their dissatisfaction with the district court's actions, both substantive and procedural. Without indicating any decision whatever on the merits of the district court's hearing on reconsideration of counsel's recusal, we take this opportunity to signify our confidence that the district court will conduct a full and fair hearing in this important aspect of this lengthy controversy.

We deny the petition for rehearing of our previous

order, rejecting mandamus relief, observing the language in a comparable case:

> We acknowledge that an order disqualifying counsel may impose significant hardship on litigants. Particularly where the grounds for disqualification are troubling, this hardship may tempt courts of appeals to assert jurisdiction pursuant to §1291. But in the words of Judge Adams:
>
> "[I]t would seem to us to be a disservice to the Court, to litigants in general and to the idea of speedy justice if we were to succumb to enticing suggestions to abandon the deeply-held distaste for piecemeal litigation in every instance of temptation. Moreover, to find appealability in those close cases where the merits of the dispute may attract the deep interest of the court would lead, eventually, to a lack of principled adjudication or perhaps the ultimate devitalization of the finality rule as enacted by Congress." Bachowski v. Usery, 545 F2d 363, 373-374 (CA3 1976).

As in Firestone, we decline to "transform the limited exception carved out in Cohen into a license for broad disregard of the finality rule imposed by Congress in §1291." 499 US at 378.

> We hold that orders disqualifying counsel in civil cases, like orders disqualifying counsel in criminal cases and orders denying a motion to disqualify in civil cases, are not collateral orders subject to appeal as "final judgments" within the meaning of 28 USC §1291. The Court of Appeals lacks jurisdiction to entertain respondent's appeal and should not have reached the merits.

Firestone, 449 US, at 379.

Richardson-Merrell, Inc. v. Koller, 472 US 424 (1985). (footnote: Only Justice Stevens dissented from the Supreme Court's holding).

The panel has further reviewed the petition for rehearing and concluded that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is DENIED.

ENTERED BY ORDER OF THE COURT

/s/ LEONARD GREEN

CLERK

ORDER DENYING MOTION FOR RECONSIDERATION AND/OR REHEARING OF MAY 27, 1993 and JUNE 2, 1993 ORDERS

(Chonich et al, Plaintiffs, v. WCCC et al, Defendants, 85-71172-DT, entered on June 11, 1993, in the U.S. District Court for the Eastern District of Michigan, by Judge Nancy G. Edmunds)

On May 27, 1993, this Court entered an order denying Plaintiffs' motion for reconsideration and denying Plaintiffs' motion to disqualify the judge under 28 USCA §§144 and 455. On June 2, 1993, the Court entered an order vacating the May 27 order only with respect to the denial of the motion to disqualify and ordering that the motion to disqualify be assigned to another judge. The motion was reassigned as case no. 93-72293.

A motion to disqualify a judge under 28 USCA §144 may be reassigned to another judge. Section 144 provides:

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further of any adverse party, such judge shall proceed no further therein, but another judge shall ne assigned to hear such proceeding.

Although the statute uses the word "shall," courts have interpreted it to mean that reassignment of a motion to disqualify is permitted, but not required. Parker v. Sill, No. 92-1158, 1993 US App Lexis 6922 (6th Cir. March 25, 1993) (construing 28 USC §144 and citing US v. Azhocar, 581 F2d 735 (9th Cir. 1978), cert. denied, 440 US 907 (1979). See also US v. Hatchett, No. 92-1065, 1992 US app. Lexis 27169 (6th Cir. Oct. 15, 1992) (construing 28 USC §455). Reassignment is required only when the judge who is the target of the disqualification motion determines that the affidavit was filed in good faith, was timely, and was legally sufficient. See, e.g., Parker No. 92-1158, 1993 US App Lexis 6922; Azhocar, 581 F2d 735; Marty's Floor Covering Co., Inc., v. GAF Corp., 604 F2d 266 (4th Cir. 1979), cert. denied, 494 US 1017 (1980).

In ordering reassignment in this case, the court did not pass judgment on whether the affidavits were filed in good faith, were timely, or were sufficient, but merely exercised its discretion in ordering reassignment under the rule that reassign

ment is permissive.

Accordingly, the Court hereby DENIES Plaintiffs' motion for reconsideration and/or rehearing of May 27, 1993 and June 2, 1993 orders.

/s/ NANCY G. EDMUNDS
US District Judge